

<sup>3</sup> Following the issuance of the January 2, 2015 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

## **ISSUE**

The issue is whether appellant established more than 32 percent permanent impairment to the right upper extremity, for which he previously received a schedule award.

On appeal, appellant's representative contends that OWCP incorrectly calculated the schedule award.

## **FACTUAL HISTORY**

OWCP accepted that appellant, a 47-year-old special agent, sustained a thoracic herniated nucleus pulposus (HNP) at T6-7, a right shoulder rotator cuff tear, and a right wrist triangular fibrocartilage complex (TFCC) tear as a result of climbing over an iron fence while executing a federal arrest warrant on January 6, 2010.<sup>4</sup> It authorized right shoulder surgery, which he underwent on March 29, 2011.

In a November 7, 2011 letter, OWCP advised appellant that he might be eligible for schedule award compensation and requested additional evidence in support of an award, including a medical report containing a detailed description of his permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>5</sup>

On December 27, 2011 appellant, through his representative, filed a claim for a schedule award (Form CA-7).<sup>6</sup>

In a December 1, 2011 report, Dr. Samy Bishai, an orthopedic surgeon, determined that appellant had reached maximum medical improvement on October 25, 2011 the date of his last examination. Regarding appellant's shoulder injury, he found that appellant suffered reduction in his range of motion (ROM) in all movements of the right shoulder joint. According to his physical examination, appellant had flexion of 110 degrees, backward extension of 30 degrees, abduction of 110 degrees, adduction of 20 degrees, external rotation of 60 degrees, and internal rotation of 30 degrees. Dr. Bishai concluded that appellant had 12 percent permanent impairment of the right upper extremity, under Table 15-34,<sup>7</sup> on page 475, of the sixth edition of the A.M.A., *Guides*. Regarding appellant's right wrist injury, he assigned appellant to class 1

---

<sup>4</sup> OWCP previously accepted claims under File No. xxxxxx787 (where appellant sustained cervical and thoracic strains while lifting and moving boxes on April 23, 2004) and File No. xxxxxx097 (where appellant sustained a chest contusion, right shoulder tendinitis, and cervical and thoracic strains as a result of falling from a forklift while working undercover).

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> Appellant, through his representative, filed claims for wage-loss compensation (Form CA-7) for the periods July 1 to 23, 2013 and February 23 to March 8, 2014. By decisions dated August 22, 2013 and April 25, 2014, OWCP denied the claims as the medical evidence was insufficient to establish that he was disabled during the periods claimed.

<sup>7</sup> Table 15-34, page 475, of the sixth edition of the A.M.A., *Guides* is entitled *Shoulder Range of Motion*.

and grade E for his TFCC tear. Utilizing Table 15-3,<sup>8</sup> on page 396, of the A.M.A., *Guides*, Dr. Bishai concluded that appellant had 10 percent permanent impairment of the right upper extremity. He also provided three percent impairment rating for ulnar nerve entrapment. Dr. Bishai found that appellant had a combined total of 25 percent permanent impairment of the right upper extremity (12 percent + 10 percent + 3 percent).

By decision dated February 7, 2012, OWCP granted appellant a schedule award for 15 percent permanent impairment to the right upper extremity for 46.8 weeks for the period December 13, 2011 through November 4, 2012. In a decision dated May 7, 2012, an OWCP hearing representative vacated the prior decision and remanded the case for further development.

In a May 16, 2012 report, Dr. James Dyer, an OWCP medical adviser, opined that Dr. Bishai properly used the ROM method of rating appellant's right shoulder impairment and concurred with the 12 percent permanent impairment rating. He further found that Dr. Bishai correctly used the diagnosis-based impairment (DBI) method of rating appellant's right wrist impairment and concurred with the 10 percent permanent impairment rating. Dr. Dyer found that the ulnar nerve neuropathy for either elbow was not an accepted condition and therefore could not be included in the schedule award computation. Utilizing Appendix A,<sup>9</sup> on page 604, of the A.M.A., *Guides*, he concluded that appellant had a combined 21 percent permanent impairment of the right upper extremity.

By decision dated October 16, 2012, OWCP granted appellant a schedule award for an additional six percent permanent impairment of the right upper extremity. It found that he was entitled to a total of 21 percent permanent impairment of the right upper extremity. As appellant had previously received a schedule award for 15 percent permanent impairment, he was entitled to an additional 6 percent (21 percent – 15 percent) permanent impairment.

On January 23, 2014 appellant, through his representative, filed a claim for an additional schedule award (Form CA-7) and submitted physical therapy notes dated January 24 through February 21, 2014. He also submitted a February 12, 2014 report from Dr. Ramon Berenguer, an internal and family medicine specialist, who diagnosed carpal tunnel syndrome of the right hand, cervical and lumbar disc syndrome, right rotator cuff tear, chronic lumbar strain, and radiculopathy of the lower extremities.

In a report dated July 30, 2013, Dr. Bishai indicated that appellant's condition had worsened. On September 26, 2013 he opined that appellant had 34 percent permanent impairment to the right upper extremity. Dr. Bishai rated appellant's right shoulder condition using "the stand alone [ROM] [. . .] because the limitation in the [ROM] [was] the most significant disability" appellant had and caused him a great deal of difficulty in activities of daily living. He concluded that appellant had 24 percent permanent impairment of the right upper extremity, under Table 15-34, on page 475, of the A.M.A., *Guides*. Dr. Bishai also reiterated his opinion that appellant had 10 percent impairment rating for his right wrist condition under Table 15-3, on page 396, of the A.M.A., *Guides*. He indicated that a TFCC tear was a class 1

---

<sup>8</sup> Table 15-3, pages 395-97, of the sixth edition of the A.M.A., *Guides* is entitled *Wrist Regional Grid*.

<sup>9</sup> Appendix A, pages 604-06, of the sixth edition of the A.M.A., *Guides* is entitled Combined Values Chart.

diagnosis. Dr. Bishai assigned a grade modifier 2 for Functional History (GMFE), a grade modifier 2 for Physical Examination (GMPE), and found that a grade modifier for Clinical Studies (GMCS) was not applicable. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), he found that (2-1) + (2-1) + (n/a) resulted in a net grade modifier 2, resulting in an impairment class 1, grade E, equaling 10 percent permanent impairment of the right upper extremity. Dr. Bishai determined that appellant had a combined 34 percent permanent impairment of the right upper extremity (24 percent + 10 percent).

On January 27, 2014 Dr. Howard Hogshead, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the evidence of record. He concurred with Dr. Bishai's 24 percent impairment rating for the right shoulder injury and the 10 percent impairment rating for the right wrist injury, but found that the total impairment rating of 34 percent was incorrectly calculated. Dr. Hogshead explained that Dr. Bishai improperly added the two percentages together instead of properly relying on the Combined Values Chart of Appendix A, on page 604, of the A.M.A., *Guides*. He concluded that using the chart correctly resulted in a combined 32 percent permanent impairment of the right upper extremity. On February 19, 2014 Dr. Hogshead indicated that appellant was therefore entitled to an additional schedule award for 11 percent of the right upper extremity.

By decision dated March 11, 2014, OWCP granted appellant a schedule award for an additional 11 percent permanent impairment of the right upper extremity. It found that he was entitled to a total of 32 percent permanent impairment of the right upper extremity and had previously received schedule awards for 15 percent permanent impairment and 6 percent permanent impairment, which entitled him to an additional 11 percent (32 percent – 15 percent – 6 percent) permanent impairment.

On April 3, 2014 appellant, through his representative, requested an oral hearing before an OWCP hearing representative and submitted an April 16, 2014 report from Dr. Berenguer who reiterated his diagnoses.

A telephone hearing was held before an OWCP hearing representative on October 16, 2014. Subsequently, appellant's representative submitted a brief arguing that OWCP incorrectly calculated appellant's schedule award compensation.

By decision dated January 2, 2015, the hearing representative affirmed the March 11, 2014 schedule award decision.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>10</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss

---

<sup>10</sup> See 20 C.F.R. §§ 1.1-1.4.

of use of specified members, functions, and organs of the body.<sup>11</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>12</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*.” The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>13</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>14</sup>

### ANALYSIS

The issue on appeal is whether appellant established that he sustained more than 32 percent permanent impairment to the right upper extremity, for which he previously received a schedule award.

The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>15</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>16</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed

---

<sup>11</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

<sup>12</sup> 20 C.F.R. § 10.404. *See also* Ronald R. Kraynak, 53 ECAB 130 (2001).

<sup>13</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>14</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>15</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>16</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>17</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the January 2, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

### **CONCLUSION**

The Board finds this case not in posture for decision.

---

<sup>17</sup> *Supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 2, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 3, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board